INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Statement of the Case	2
Rulings Below	7
Questions Presented	8
Statute Involved	9
Specification of Errors	11
Summary of Argument	12
Argument:	
Point I. § 77 of the Bankruptcy Act does not limit Damages recoverable on the rejection of an executory Lease	15
A. The History of § 77 indicates no Intention to impose a Time-Limitation as the measure of Damages	15
B. This Court has held the "Injury" from Rejection to be the Loss of Future Rents	17
C. In § 77 "Actual Damages" means "Compensatory Damages"—not "Past Damages"	18
D. As construed Below § 77 is unconstitutional	20
Point II. The Landlord is entitled to Damages under the Provisions of the Lease if the Property Returned by the Tenant is not fully fit for immediate use	21
Last Point	28
Appendix:	
I. Explanation of Calculation of Damages on Rejection	29
II. Details of Property Deficiency Claim	31

CITATIONS

CASES:

Addieg *v.* Tull, 187 Fed. 101, 103 19
Barton Co., *In re*, 34 Fed. (2) 517 24
City Bank Farmers Trust Co. *v.* Irving Trust Co., 299 U. S. 433, 439, 443 ..... 11, 17, 21
Irving Trust Co. *v.* Perry Co., 293 U. S. 307. 24
Kuehner *v.* Irving Trust Co., 299 U. S. 445, 453 ..... 9, 11, 21
Maynard *v.* Elliott, 283 U. S. 273 23
Metropolitan Chain Stores, *In re*, 66 Fed. (2) 485 23
N. Y., N. H. & H. R. R., *In re*, 92 Fed. (2d) 428 19
Old Colony R. R. Co. *v.* N. Y., N. H. & H. R. R. Co., 98 Fed. (2) 670 16
Samuels *v.* E. F. Drew & Co., 292 Fed. 734, 738 19
S. E. Hendricks Co. *v.* Thomas Pub. Co., 242 Fed. 37 19
Trust Co. of Georgia *v.* Whitehall Holding Co., 53 Fed. (2) 635 24
Wm. Filene's Sons Co. *v.* Weed, 245 U. S. 597, 602 ..... 17, 18

STATUTES:

Bankruptcy Act, § 63 ..... 3, 16
Bankruptcy Act, § 77 (11 U. S. C. § 205 (b); 49 Stat. 911, Aug. 27, 1935) 9, 11, 12, 15, 17, 18, 20
Bankruptcy Act § 77B 3, 5, 8, 9, 12, 16, 17, 20
Judicial Code, § 240 (a), as amended by the Act of February 13, 1925, 43 Stat. 938 2

HER AUTHORITIES:

	PAGE
Amendment of R. R. Reorganization Act, 36 Col. Law Rev., 27, 50-52	16
Black's Law Dictionary, (2nd Ed.), p. 315	19
79 Cong. Rec. 13298, 13764 (1935)	16
Lessors' Claims under § 77, 47 Yale Law Jour., 272-277	16
Report Fed. Coordinator of Transp. dated Jan. 21, 1935 (House Doc. No. 89)	16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 63

CONNECTICUT RAILWAY AND LIGHTING COMPANY,
Petitioner,

AGAINST

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, as Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor,
Respondents.

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court (per Hincks, *J.*) appears at pages 313-364 of the Record, and is not reported. The opinion of the Circuit Court of Appeals (per Manton, *J.*) appears at pages 1361-1366 of the Record, and is reported at 95 Fed. (2nd) 483, (A. N. Hand, *J.*, concurring in result).

Jurisdiction

Jurisdiction is vested in this Court by § 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938. The order for mandate of the Circuit Court of Appeals was filed March 14, 1938 (R. 1367).

Statement of the Case

On December 19, 1906, your petitioner (C. R. & L.), as landlord, leased certain public utility properties to the New Haven Railroad (then known as The Consolidated Railway Company) for 999 years at a stipulated annual rental, (after August 1, 1914,) of $1,400,000 (R. 101-129).

After February 28, 1910, the "gas and electric properties" were assigned by the New Haven, for the balance of the term, to a solvent assignee at one-quarter of the rental reserved by the head lease. These properties and this quarter of the rent are not relevant here. The instant case is concerned only with the "electric railway properties", which were thereafter subjected to three-quarters of the rent, amounting annually to $1,049,563.50 (R. 619). The New Haven made no default under the Lease till 1935.

On October 23, 1935, the New Haven filed its petition under § 77 of the Bankruptcy Act (R. 4). The petition was approved (R. 15) and the New Haven was authorized by the Court to reject the Lease (R. 19).

On December 18, 1935, the New Haven and its Trustees reported to the District Court that they rejected the Lease (R. 48).

On April 30, 1936, your petitioner filed claims for unpaid rent under the Lease to petition filed, and for damages on account of rejection and deficiencies in property returned.

On June 30, 1937, the hearing on the claim commenced in the District Court (R. 377).

On the hearing (and on the appeal Below) two questions were presented:

I. When the Lease was rejected and the tenant's liability for rent thus finally discharged, what was the measure of the landlord's (C. R. & L.) provable claim for damage? Was C. R. & L. entitled to prove for the difference between the present worth of the rent and the rental value, both discounted, for the balance of the term? Or did § 77 of the Bankruptcy Act prescribe some limitation, as did § 77B and § 63?

The District Court held that only damages for the period already past at the time of hearing on the claim should be allowed (R. 336-337); but that a supplemental hearing might be held later to liquidate any damages which accrued in the interim (R. 338). The Court was led to this conclusion by the words of § 77: "Any person injured by such non-adoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings."

The District Court was quite clear that "principles obtaining in equity proceedings" had nothing to do with the amount or provability of damages (R. 332). The

difficulty arose from the word "actual"; and he held that "actual damage" must mean damage accrued at the time of the hearing (R. 335), to the exclusion of all "future" damages not then accrued under the Lease. Of course the Lease did not provide for damages. It provided for *rent*. And when the Lease was rejected, it is not immediately apparent why all the *damages* did not accrue right then and there.

So the landlord (your petitioner) was limited to proving a claim for damages based on rent which would have accrued under the Lease at the date of the hearing—and no more.

The Circuit Court of Appeals affirmed this disposition (Opinion by Manton, *J.*) but without discussion of the principles involved (R. 1363). The Court says:

> "The court properly declined to allow under this claim for the breach of any future damages. But, where loss of rent is abundantly proved up to the time of repossession of the property, it is of sufficient certainty to be allowed. Therefore, the 'actual damage or injury' means that of the past. A long lease such as for 999 years adds to the reasonableness of this application of the statute. Congress intended by the phrase of the statute to end controversies as to future damages involved in long leases, and it did so by making such claims under a lease provable and so dischargeable, thus disposing of them." (R. 1363-4).

It is respectfully suggested that this is difficult to follow. The first sentence seems to affirm the District Court.

The second sentence speaks of "repossession of the roperty". § 77B has such a reference; but not § 77. he District Court took proof of damages to the time of earing—not of repossession.

The fourth sentence speaks of the length of this par-cular Lease as affecting the construction of the Statute.

The fifth sentence we entirely agree with; but your etitioner's claim for "future" damages has been held ot provable.

II. The other question presented involves the construc-on, not of the Statute, but of the Lease. The property eturned to C. R. & L. by the tenant was deficient, in uantity and quality, for discharging the public service volved in furnishing transportation to the territory.

The provision of the Lease in respect to the return f the property is (R. 117):

> "The Lessee covenants that at the expiration of this Lease, whether by lapse of time or otherwise, it will deliver to the Lessor possession of the demised property as changed, altered, added to and improved, as hereinabove provided, and that the demised property shall then be in such condition and with such equipment, materials and appurtenances as to fully fit it for the immediate use of the Lessor in the same manner as at present."

The landlord contended that this meant fully fitted to ender the public service which the circumstances at the me of redelivery demanded; and, on this basis, uncon-roverted evidence was given as to the deficiencies in the roperty returned.

The District Court disallowed the claim, holding that evidence of the condition of the property in 1906, the date of the Lease, was necessary (R. 349), and that none had been given by C. R. & L. The District Court, however, did deal with the covenant set forth above.

The Circuit Court of Appeals says, (R. 1365):

> "Other deficiencies claimed were properly disallowed. Under the 1906 lease, the lessee covenanted 'at its own expense to maintain said demised premises and property during said term in as good order, repair and condition as the same are now, and in their present state of efficiency'. This the court properly held 'fixes as a standard the degree of equality of maintenance as it existed in 1906'. There was no evidence as to this standard upon which to support a breach of these covenants of maintenance or restoration. The claimant produced no evidence upon which to support a finding of the 1906 condition of the property."

If the learned Court of Appeals is basing its conclusion on the maintenance and replacement covenants (R. 115) from which it quotes, then it should be said at once that the claim for property deficiency was not based on these covenants. The covenant above set forth appears not to have come to the Court's attention.

Rulings Below

1.) C. R. & L. claimed for rent accrued to petition filed $388,282.83. The District Court allowed for this $332,330.88. The Circuit Court of Appeals allowed $388,282.13 (R. 1364).

2.) C. R. & L. claimed damages of $2,057,862.02 for deficiencies in the property returned. The District Court allowed $173,537.35 (R. 373). The Circuit Court of Appeals affirmed (R. 1365).

3.) C. R. & L. claimed $23,190,314.73 as damages for the rejection of the lease.[1]

The District Court allowed as such damages:

a.) For the period from petition filed (Oct. 23, 1935) to rejection (Dec. 18, 1935)—nothing.

b.) For the period from rejection to hearing on the claim (June 30, 1937) $1,263,412.92 (R. 372).

c.) For the period from hearing to the end of the term of the Lease—nothing.[2]

The Circuit Court of Appeals allowed as such damages:

a.) For the period from petition filed to rejection—nothing.

---

[1] That is, the difference between the present worth of rent and of rental value for the balance of the term of the lease, liquidated by discounting at 4%.

[2] The Court, however, gave C. R. & L. the right to apply for a later supplemental hearing to liquidate any damage which might have accrued in the interim (R. 338); but it must be *past* damage. The Circuit Court if Appeals approved the proposed procedure.

b.) For the period from rejection to hearing on the claim $1,263,412.92, and "the claimant's Federal income tax must be added in calculating the amount realized on the claim for the period between rejection of the lease and the date of hearing before the court Below". (R. 1364).[8]

c.) For the period from hearing on the claim to the end of the term of the Lease—nothing.

Questions Presented

1.) Is a landlord under an unexpired lease rejected in proceedings under § 77 a creditor entitled to prove for damages measured by the difference between the present worth of rent and rental value for the balance of the term?

2.) When Congress provided in § 77 that a landlord under a rejected lease was "a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings", did Congress intend to limit the landlord's claim to damages based on rent past at hearing?

3.) If the landlord's claim under the lease is discharged by rejection, must not his claim for damages based on rent accruing after hearing "be admitted to participation

[8] The meaning of this is not clear, *i. e.*, whether the income tax is to be added to the rent in making a minuend from which operating income is to be subtracted in order to arrive at damages; or whether the income tax is to be calculated on the damages allowed and then added to the damages; or whether the income tax on the net operating income, the subtrahend, is to be calculated and subtracted before using the operating income as a factor.

on an equitable basis with other claims in shaping the reorganization and in distribution of that which is to go to creditors pursuant to any plan adopted"?[4]

4.) If "actual damage" as used in § 77 means "past damage" (R. 335), is there a compliance with the constitutional requirement that if claims for "future damage" are to be discharged, they must be provable at least within the limits of some reasonable formula?[5]

5.) When the Lease provided (R. 117) that on its expiration the New Haven would deliver back the property to C. R. & L. and that it should "then be in such condition and with such equipment, materials and appurtenances as to fully fit it for the immediate use of the Lessor in the same manner as at present", did this mean "fully fit to render the public service required at the time of delivery"? Or did it mean in as good order as when the Lease commenced? (R. 1365).

Statute Involved

§ 77 of the Bankruptcy Act, (11 U. S. C. § 205 (b); 49 Stat. 911, Aug. 27, 1935) provides:

"§ 77. Reorganization of Railroads * * * (b) * * * The term 'creditors' shall include, for all

---

[4] *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, at 453.

[5] Damages and rent, of course, are different: damage is the injury remaining after all benefits are credited; *i. e.*, the lost rent *less* the rental value of the property returned. So, § 77B says the damages shall not exceed three years' *rent*, thus furnishing a formula which has been held not unreasonable. This is quite different from giving full damages for one period, and simply destroying all claim for them for another, *e. g.*, for the period after the hearing.

purposes of this section, all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease. * * * The term 'claims' includes debts * * * or other interests of whatever character. * * *

"In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. * * *

(f) * * * "The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention."

Specification of Errors

ıe Circuit Court of Appeals erred in holding:

) That the amount of the landlord's provable claim damages is *not* "the difference between the rental e of the remainder of the term and the rent reserved, discounted to present worth",[6] but is the amount of ages based on rent past at hearing on the claim.

) That the law's delay between rejection of the Lease final hearing on the claim constitutes an "equitable "[7] for measuring the participation of the landlord ıe distribution of assets.

) That § 77 limits the provable claim of a landlord amages based on rent past at hearing, although his ı for damages for loss of future rents is discharged.

) That the duty of the tenant was performed fully redelivered the property in condition as good as the ition in 1906, instead of returning it "with such ɔment, materials and appurtenances as to fully fit r the immediate use of the Lessor" (R. 117).

---

ity Bank Co. v. *Irving Trust Co.*, 299 U. S. at 443.

uehner v. *Irving Trust Co.*, 299 U. S. at 453.

SUMMARY OF ARGUMENT

I.

Your petitioner was landlord to the New Haven Railroad. The Lease was disaffirmed by the New Haven's Trustees pursuant to authority of the Bankruptcy Court. Your petitioner then claimed as damages for the loss of the Lease "the difference between the rental value of the remainder of the term and the rent reserved, both discounted to present worth," viz.: $23,190,314.73.

A hearing was had on the claim in the District Court (Hincks, *J.*) on which the Court ruled correctly: that under § 77, as was decided with respect to § 77B, a lessor has a provable claim "for injury due to the rejection of his lease whether the instrument contained a covenant of indemnity or not, and even though the lease be terminated subsequent to its rejection in the bankruptcy proceedings" (R. 329); that the provision of § 77 that a claim shall be provable "to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings" does not modify the right created or recognized, but modifies "only the remedy; only the damages provable under the right" (R. 330); that the phrase "the principles obtaining in equity proceedings" furnishes no ground for excluding what he calls "future damages", for in equity receiverships, as in bankruptcy, if the lease contains a proper covenant, "it is abundantly clear that such damages, when proved with sufficient certainty, must be allowed" (R. 332-333).

The District Court then proceeded to construe the word actual", in the phrase "the actual damage or injury", as equiring that the damage must have accrued from past efaults (R. 334-335) "to the exclusion of all 'future' amages not yet accrued"; and he said: "While I feel onstrained to hold that by statute I am precluded from llowing 'future' damages, I am still free, indeed impelled, o to direct these proceedings that the rigid limitation of he statute, while serving its purpose, may yet interfere s little as possible with substantial justice" (R. 336).

So he allowed only damages based on rent past at the ate of hearing.

The rationale of the opinion of the Circuit Court of ppeals (per Manton, *J.*; A. N. Hand, *J.* concurring in esult,) is not susceptible of analysis (R. 1363).

It is respectfully submitted:

The Statute as interpreted Below overturns established gal principles under which the claims of executory credit- rs could not be discharged in the exercise of power under he Bankruptcy Clause, without provision for admitting hem to participation on an equitable basis in the debtor's ssets; it denies to landlords the right to damages for loss f their leases, which Congress attempted to give them in 77, and leaves many of them in a worse plight than hey would be before the enactment of § 77. It provides hat justice should be commensurate with the law's delay; nd it violates the Fifth Amendment.

II.

The landlord's property was returned to it on November 16, 1936. It was wholly inadequate for the immediate use of the landlord, and this fact was established on the hearing without being controverted.

Under the restoration clause of the Lease the tenant, at the expiration of the Lease, covenanted that it would deliver the property back to the landlord, and that at that time it should be in "such condition and with such equipment, materials and appurtenances as to fully fit it for the immediate use of the Lessor in the same manner as at present".

Your petitioner contends that this means that the property, when returned to it, should have been fit to render the public service which the circumstances at the time of the redelivery demanded. The evidence is uncontroverted that the money value of the deficiencies in this respect at the time of redelivery was $2,057,862.02, of which the Courts Below allowed only $173,537.35—this being a single item.

The question presented, therefore, is the interpretation of the restoration clause of the Lease.

ARGUMENT

POINT I

§ 77 of the Bankruptcy Act does not limit damages recoverable on the rejection of an executory lease.

The question presented is the construction of the words § 77:

> "any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings."

A.

The History of § 77 indicates no Intention to impose a one-Limitation as the measure of Damages.

§ 77 was originally enacted on March 3, 1933. It pro-ded that the term "creditors" should include all holders claims against the debtor, "including claim for future nt, whether or not such claims, interests, or securities ould otherwise constitute provable claims under this ct".

In 1935 § 77 was amended. The amendatory bill, H. R. 49, in its original draft, provided that in case an exec-ory contract or unexpired lease were rejected, "any rson injured by such non-adoption or rejection shall, r all purposes of this section, be deemed to be a creditor the extent of such damage or injury" without further nitation. "Thus," says the District Court (R. 334),

"the original text of the bill was admirably worded to accomplish the allowance of future damages."

The final text of the amendment (p. 10, *supra*) differs from this, principally by substituting "actual damage" for "such damage", and by adding the cryptic phrase, "determined in accordance with principles obtaining in equity proceedings".

Apparently, all the commentators[8] and courts who have considered the matter (with the possible exception of Judge Manton) conclude that the final phrase has nothing to do with the amount of damages. It is the words "actual damage" which led the District Court to conclude that he was bound by a "rigid limitation of the statute" (R. 336) precluding proof of claims for loss of future rents. If the desire of Congress was to leave the final determination to the courts, this ruling has defeated such intention.

Furthermore, the fact that categorical limitations on future rent claims were included in § 63 and § 77B, but not in § 77, is as indicative of an intent to allow such claims in full as to place some limitation on them; and the preliminary drafts clearly indicate that no limitation was contemplated. Neither on the testimony before the Judiciary Committee, nor in the reports of the bill to Congress, nor in the discussion on the floor, is there any suggestion that a limitation was intended.

The history of the legislation, therefore, furnishes no indication that any change of substance was intended by the final amendment.

---

[8] Friendly, *Amendment of R. R. Reorganization Act*, 36 Col. Law Rev., 27, 50-52; *Lessors' Claims under § 77*, 47 Yale Law Jour., 272-277; (R. 332-333); Report Fed. Coordinator of Transp. dated Jan. 21, 1935 (House Doc. No. 89); 79 Cong. Rec. 13298, 13764 (1935); *Old Colony R. R. Co.* v. *N. Y., N. H. & H. R. R. Co.*, 98 Fed. (2) 670.

B.

This Court has held the "Injury" from Rejection to be the Loss of Future Rents.

§ 77B of the Bankruptcy Act says: "any person injured by such rejection shall * * * be deemed to be a creditor".

§ 77 says: "any person injured by such nonadoption or rejection shall * * * be deemed to be a creditor".

This Court has said, with regard to § 77B: "the purpose is clearly to give a landlord a provable claim for injury due to the rejection of his lease, whether the instrument contains a covenant of indemnity or not", (299 U. S. 441).

The same conclusion is obviously true of § 77.

This Court has also stated: "The amount of the landlord's claim for the loss of his lease necessarily is the difference between the rental value of the remainder of the term and the rent reserved, both discounted to present worth", (299 U. S. 443).

This method of liquidation is "familiar and fair".

Wm. Filene's Sons Co. v. *Weed,* 245 U. S. 597, 602.

It is recognized in allowing claims under § 77B.

City Bank Farmers Trust Co. v. *Irving Trust Co.,* 299 U. S. 433, 443.

Certainly no court has allowed a claim under § 77B for damages which were not "actual". So that damages thus calculated must be actual, even though Congress has provided for a three-year rent limitation on the amount.

But in the instant case, the loss of benefits under the Lease accruing after date of hearing was held no measure of the landlord's claim for any purpose. It was not that recovery for this loss was limited by some reasonable commutation. It was denied and discharged without recognition.

In effect, therefore, no claim under the Statute was allowed for injury resulting from rejection; for proof of any previously made and lawful claim that matured within a reasonable time before distribution could be made was always allowed in equity receiverships. (*Wm. Filene's Sons Co.* v. *Weed*, 245 U. S. 597, 602). The last state of landlords is thus worse than the first. No longer may they keep alive their claim by refusing to reenter. No longer may they prove for anticipatory breach under a covenant of indemnity.

Surely this was not the result intended by Congress when it undertook "to supply the omission of the Act of 1898 [*i. e.*, a remedy for the loss of future rents] and to create a claim provable in a reorganization proceeding for injury due to a trustee's rejection" (299 U. S. 442).

C.

In § 77 "Actual Damages" means "Compensatory Damages"—not "Past Damages".

As set forth above, § 77 as enacted in 1933, defined a creditor, *inter alia*, as the holder of a "claim for future rent". When § 77 was amended in 1935, it is reasonable to suppose that this phrase gave pause to the draftsman.

He would say: "Not the future rent—only the damages, only the net loss; the difference between the present worth of the rent and of rental value for the balance of the term * * *".

The quick way to say this is "actual damage". "The peculiar and unfortunate status of landlords' claims under the Bankruptcy Act of 1898" (299 U. S. 453) was known, and "in framing the reorganization statute Congress obviously attempted to award landlords an equitable share in the debtor's assets as, in justice, it was bound to do since the purpose was to discharge the debtor from liability to future suits based upon the lease" (*id.*). Furthermore, "actual damage" had been judicially held to mean the difference between the stipulated rent and the sum for which premises were leased to other parties (*Addieg* v. *Tull*, 187 Fed. 101, 103); and at the same time, so far as known, no court has ever before construed this phrase as eliminating consideration of the future consequences of the act upon which liability is based.

See:

In re N. Y., N. H. & H. R. R., 92 Fed. (2d) 428.
S. E. Hendricks Co. v. *Thomas Pub. Co.*, 242 Fed. 37.
Samuels v. *E. F. Drew & Co.*, 292 Fed. 734, 738.
Black's Law Dictionary, (2nd Ed.), p. 315.

If Congress, by using the word "actual" sought to impose any further limitation upon a lessor's claim than the one here urged, then it certainly chose language which is poorly adapted to this purpose. Where such limitations are found, they are clearly stated, as in § 63(a) and in

§ 77B(b), and contain specific references to surrender of the property as the operative date. Moreover, if the limitation prescribed below was intended when § 77 was amended in 1935, there was need for clarity; for in that event Congress exactly reversed the policy it had adopted when § 77 was first enacted.

The reason for the three-year limitation in § 77B and the absence of any such limitation in § 77 is found in the subject matter of the two sections. § 77B usually involves business properties, which a landlord may relet, thus mitigating his loss. It is desirable to have a rule of thumb in such cases which will work substantial justice without the necessity of long and elaborate proof. In the case of railroads, however, usually the lessor cannot relet except to the reorganized tenant, and this obviously is a complicated matter in which the non-operating landlord is at a disadvantage. Moreover, to a great extent, every railroad lease is unique; hence no rough and ready rule of limitation would have been practicable. The matter was accordingly left to be adjusted by the application of the usual measure of damages to the circumstances of each individual case.

D.

As construed Below § 77 is unconstitutional.

The Courts below have allowed only damages based on rent past at hearing. In a pie powder court this would mean zero. In any other court it results in the recovery being proportionate to the law's delay. In any event, it here results in the destruction of the tenant's liability for

future rents without any compensation therefor. This is beyond the power of Congress under the Bankruptcy Clause, and violative of the Fifth Amendment.

If claims "for rent to accrue under a lease * * * are to be discharged they must be made provable, for they cannot be destroyed."

City Bank Co. v. *Irving Trust Co.*, 299 U. S., at 439.

Kuelner v. *Irving Trust Co.*, 299 U. S., at 453.

POINT II.

The Landlord is entitled to Damages under the provisions of the Lease if the property returned by the Tenant is not fully fit for immediate use.

The question here presented involves the interpretation of the covenant of the Lease with regard to the redelivery of the property by the tenant on the expiration of the Lease, viz., that the property should "then be in such condition and with such equipment, materials and appurtenances as to fully fit it for the immediate use of the lessor in the same manner as at present".

The Lease contains the following provisions:

Record 115 (Maintenance Clause):

"And the Lessee covenants at its own expense to maintain said demised premises and property during said term in as good order, repair and condition as the same are now, and in their present state of efficiency, and that at its own expense it will make all improvements, alterations and renewals of said

demised property which in its judgment, acting in good faith, may be best adapted to safeguard and develop said property and to promote its interests and to preserve its franchises, rights and powers."

Record 115 (Replacement Clause):

"And the Lessee further covenants that at its own risk and expense it will in good faith and to the best of its ability operate the Lessor's said railways, lighting and power plants and all other property leased, operated, owned or controlled by the Lessor and that it will furnish all apparatus, equipment and plant in substitution for and in addition to that hereby demised which in its judgment may be necessary or proper for such operation."

Record 115 (Enlargement Clause):

"And the Lessee further covenants that at its own first cost and expense it will enlarge and extend said property within the territorial limits of the towns where said property is now located, and that it will acquire, so far as practicable, necessary franchises, rights and powers in the name of the Lessor, for the purpose of enabling the Lessee to enlarge and extend, as aforesaid, and to carry on, preserve and develop the business, in such manner as shall at all times to the Lessee, acting in good faith, seem adapted to develop and safeguard the property, to promote and preserve its interests, and to extend its franchises and powers within said territorial limits."

Record 117 (Restoration Clause):

"The Lessee covenants that at the expiration of this lease, whether by lapse of time or otherwise, it

will deliver to the Lessor possession of the demised property as changed, altered, added to and improved, as hereinabove provided, and that the demised property shall then be in such condition and with such equipment, materials and appurtenances as to fully fit it for the immediate use of the Lessor in the same manner as at present."

The tenant, then, covenanted that when the property was delivered to C. R. & L.—not when the Lease terminated, but when redelivery was made—the property should be in such condition and consist of such items "as to fully fit it for the immediate use of the Lessor in the same manner" as in 1906; which means fully fitted to render the public service and furnish the transportation which the circumstances at the time of delivery demanded. It must mean this. When its property was delivered by the Lessee, that was the moment when the property was to be up-to-date, sufficient, and in good order to operate. Its condition at any other date would be a matter of indifference.

For breach of the covenant to restore the property as agreed there is a provable claim.

In re Metropolitan Chain Stores, 66 Fed. (2) 485.

And this claim need not be a liquidated claim at petition filed.

Maynard v. *Elliott,* 283 U. S. 273.

And the fact that it arises from a lease does not make it any less provable.

Irving Trust Co. v. *Perry Co.*, 293 U. S. 307.
Trust Co. of Georgia v. *Whitehall Holding Co.*, 53 Fed. (2) 635
In re Barton Co., 34 Fed. (2) 517.

When, therefore, on December 18, 1935, the Lease was reported to the Court as having been rejected, there arose a duty on the part of the Debtor, as of petition filed, to deliver back to C. R. & L., its property "in such condition and with such equipment, materials and appurtenances as to fully fit it for the immediate use of the Lessor in the same manner as at present". So long as no property was restored, the Debtor was 100% in default under the covenant.

The property was finally restored on November 16, 1936, as the result of an order granted to C. R. & L. (R. 290). At the date of the restoration the property was short and defective. These conclusions were reached by an inspection and survey by experts with regard to the necessities of the "immediate use of the Lessor"; and the evidence is uncontroverted. After crediting the property delivered, the balance of shortages and deficiencies is the amount of the claim.

As of petition filed, the claim for restoration became fixed and absolute. As of the date of restoration, it became liquidated; the liability was ascertained in dollars.

The District Court disallowed the claim (R. 349), except in one detail.

The Connecticut Company, the New Haven's subsidiary, which was in possession of the property and operating it, in breach of the tenant's covenant to provide necessary equipment "at its own risk and expense," purchased 46 busses under conditional bills of sale. These busses were the property of C. R. & L., and should have been free and clear of liens. The operating subsidiary of the New Haven, however, took operating income earned during the period of bankruptcy administration, and paid off the vendors' liens, $173,537.35. The District Court remarked that this was equivalent to returning the busses subject to the liens (R. 351); and, accordingly, ruled that the item was provable as a "deficiency".

With regard to all the other items under this heading, however, the District Court disallowed them all. He construed the *maintenance* covenant as meaning only that the property to be returned must be in as good order as the property was in 1906 (R. 349); and he construed the *replacement* covenant as requiring bad faith to be shown in order to establish a liability thereunder (R. 350).

But it is submitted that the restoration covenant of the Lease is not dependent on the maintenance (quality) or replacement (quantity) clauses. The maintenance and replacement clauses are evidently inserted to provide that *during the term* of the Lease the properties shall be kept up, enlarged and efficiently operated. The only interest C. R. & L. could have had in this matter was to be sure that the good-will and the business-as-a-going-concern were preserved. It was to get a stated rental, in any case, for 999 years. It was a matter of indifference to C. R. & L. whether the properties were kept up and developed or not—except for the fact that *when they were restored,*

C. R. & L. wanted a good going business. When restoration of the properties took place, then it was that they were to be "fully fit for the immediate use of the Lessor"; and the only way C. R. & L. could be sure of a good going business at restoration was through a covenant that the Lessee would operate the properties efficiently during the term.

The maintenance and replacement clauses, therefore, are really covenants supplementary to the enlargement and operation clause (R. 115) which they immediately precede; and are not related to the restoration clause, from which they are far separated by other matter not germane to this end.

When the restoration clause is reached, there is nothing said about good faith or 1906 condition. There is a coördinate, independent covenant "that the demised property shall then be in such condition and with such equipment, materials and appurtenances as to fully fit it for the immediate use of the Lessor in the same manner as at present".

The Respondents contend that this means that the properties when restored, shall be fully fit for immediate use in the same degree of inadequacy and decrepitude as in 1906. But it does not say this; and it is unreasonable to suppose that such a yardstick would be provided for use after 999 years, when no survey, inventory or appraisal was agreed on in 1906. No one in 1906 could tell what the requirements of immediate use were to be in the year 2905. The answer to that question was left to be ascertained, when the time came, by comparing the requirements of the then situation with the provision on hand to meet them. And so in 1936, when

he injunction was lifted and the property was restored, C. R. & L. proved that the quality and quantity of the property returned were wholly inadequate in relation to the requirements of the situation. It would have done the same in 2905.

C. R. & L. objected to the introduction of testimony to show the condition of the property in 1906 (R. 608), but was overruled (R. 363). The evidence was not only irrelevant and immaterial, but the probative effect was equivocal. The testimony indicated that in 1907 a great deal of work was done on the property by the tenant. This may be evidence that the New Haven was extravagant, or that the properties were then greatly extended, or the particular necessities of the tenant required a different set-up for its "door-to-door" service. In any case, the testimony should have been excluded.

After the property was returned to C. R. & L. it was surveyed, inventoried and appraised; expert estimates of the requirements of the situation from an operating standpoint were made, and careful reports, which are in evidence, were compiled. The composite result showed the deficiencies in relation to the requirements in quantity and quality of the property, reduced to dollars at current prices.

In ascertaining these deficiencies and reducing them to dollar values, C. R. & L. summarily assumed that property received should average 50% depreciated, and that shortages likewise should be claimed on a 50% basis. The District Court imagined that this concession was connected in some way with the fact that the properties were not brand new in 1906, and some approximation of their then value was proper now (R. 349).

Not at all.

In the course of finding out what "fully fit for immediate use" meant, it became evident that some rule of reason would apply. The property did not have to be all new. If the life of a trolley car were ten years then, out of ten cars returned, one should be brand new and one ten years old; one should be one year old, and one nine years old; and so on (fol. 1191). This resulted in the average being 50% depreciated. This was fair and reasonable. This is Appellant's understanding of the intention of the parties to the Lease. It did not ask for more. (R. 403, 443, 463, 525.)

The details of the items making up the claim and the method of calculating each is set forth in the Appendix hereto at page 31.

LAST POINT

The decision and order for mandate of the Circuit Court of Appeals for the Second Circuit should be modified to provide that the claim of petitioner for damages for rejection of the Lease should be allowed in the sum of $23,190,314.73,* and that the claim of petitioner for damages for deficiencies in the demised property returned by the respondents on the rejection of the Lease should be allowed in the sum of $2,057,862.02.

Respectfully submitted,

GEORGE W. MARTIN,

Counsel for Petitioner.

October, 1938.

---

* The details of the calculation of this amount are set forth in the Appendix hereto at page 29.

APPENDIX.

I.

Explanation of Calculation of Damages on Rejection.

The annual stipulated rent is $1,049,563.50 (R. 619). This rental, however, was tax free to C. R. & L. The Lease provides (R. 114):

> "And the Lessee further covenants to pay from time to time during the continuance of this lease all taxes, water rents, rates, charges, license fees and assessments, ordinary and extraordinary, of every nature and description, which may be lawfully imposed or assessed in any way upon the Lessor or Lessee with reference to the demised property, the capital stock of the Lessor, its indebtedness, contracts, rights, privileges, franchises and revenues, or said reserved rental, or the disbursement thereof, or its right to do business or be a corporation; said payments to be made to the authority or treasurer entitled by law to receive the same, whether Federal, State or municipal; the intent of this agreement being that the Lessor may be able to disburse the rentals which it will receive in the annual sums as above mentioned in payment of interest upon debts and for sinking funds and for dividends upon its stock or for other distribution, without being required or finding it necessary to pay, retain or deduct any of the same for any other purpose through or by reason of any imposition or assessment by or under any laws or proceedings heretofore or hereafter made or authorized by the United States or by the State of Connecticut or by any municipality of said State."

The taxes for one year which are thus involved, are:

Local real estate taxes.....	$2,755.68	(R. 379)
Bondholders' interest (Fed.)..	2,762.44	(R. 379)
Federal Income tax.....	100,593.37	(R. 380)
Federal Capital Stock tax....	1,000.00	(R. 381)
	$107,111.49	(R. 381)

This amount must be added to the stipulated rental to ascertain its *value when tax free.*

The value of the annual rent, therefore, is $1,156,674.99. The District Court disallowed the element of Federal Income Tax (R. 342) saying:

> "Even if it be true that this figure approximates the debtor's *obligation* with respect to the federal income tax, that fact has no bearing upon the claimant's *damage*. For the claimant's income tax is assessed upon rentals actually paid, not upon the breached obligation to pay. By the breach the claimant's liability for income tax necessarily shifted from a rentals basis to an earnings basis. That being so, the claimant could not be damaged by the debtor's failure to settle a tax liability which had terminated. If anyone was 'damaged', it was the government."

Apparently the idea was that the income taxes payable under the Lease were only payable if, as, and when rent, *qua* rent, was actually paid by the Debtor. If the rent were defaulted, the obligation to pay taxes would vanish; for a claim in bankruptcy measured by rent was not rent-under-the-Lease.

But this overlooks the fact that the operating income which must now take the place of the rent, is not tax free. The stipulated rent, $1,049,563.50, is merely the

number of tax-free-dollars deliverable in a year. The *value* of this delivery is $1,156,674.99.

The properties were operated by The Connecticut Company, a wholly owned subsidiary of the New Haven, during the year following the filing of the petition. The operating income for that year, November 1, 1935, to October 31, 1936, as shown by The Connecticut Company's books, is $229,062.40.[10]

The *difference* between the value of the annual rent and the annual operating income from the properties surrendered to C. R. & L. is $927,612.59; which is the amount of the annual damage on account of rejection.

This amount, the annual proven damages, discounted at 4% over the balance of the term after rejection, comes to $23,190,314.73.

II.

Details of Property Deficiency Claim.

(a.)

Trolley Cars: The claim is for deferred maintenance and obsolescence of trolley cars returned to C. R. & L.

---

[10] The Stipulation, Exhibit 1 (R. 621) states this figure as $183,911.34. The figure was incorrect. It was corrected on a rehearing granted by the District Court (R. 368), by a supplemental stipulation (R. 370). The supplemental stipulation reduces the maintenance accruals from $179,089.59 (R. 621) to $133,938.53 (R. 370) thus increasing the annual operating income by the difference, $45,151.06; so that it becomes $229,062.40. This accounts for certain inconsistencies in figures between the Court's Opinion (R. 313) and the Order on the Claims (R. 371).

The calculations in the Record of the basic annual damages at $865,652.16 (R. 384) were made on the assumption of an annual operating income of $183,911.34—these damages being the difference between the stipulated rent $1,049,563.50 and $183,911.34 (R. 384). The recalculation, required after the rehearing, shows the basic annual damages to be $1,049,563.50 minus $229,062.40, or $820,501.10.

The witness Reilly testified (R. 390-414) as to the condition of the cars, and supported his evidence with written reports (Ex. 8, R. 629, Ex. 9, R. 824, Ex. 10, R. 861, Ex. 11, R. 955, Ex. 12, R. 1042, and Ex. 14, R. 1096), containing the details of the inspection and the conclusions. Certain of the oldest cars were obsolete, and were valued as such. The cost of replacing these new was calculated; and then this figure was cut in half so as to represent the value of these cars if they had been depreciated 50%—which was taken as what they fairly should be when returned (R. 397). The cars actually returned not obsolete were surveyed, and an appraisal made of the expense of putting them in reasonably good running condition. The total cost of replacing obsolete cars with 50% depreciated modern equipment, plus the actual cost of bringing the usable cars up to a 50% depreciated condition, comes to $334,448 (R. 401).

The witness testified that the total damages amounted to $634,234. (R. 400); but counsel for C. R. & L. insisted on cutting the claim for the cost of replacement equipment in half (so as to apply the 50% depreciation formula). This halved the items $528,000. and $63,000. (R. 401), leaving intact the item $43,234. for immediate repairs. The figure $334,448., therefore, reflects the cost of repairs immediately required on usable cars, plus modern equipment at 50% of cost in replacement of the hopelessly obsolete.

(b.)

Track and Roadway: The claim under this heading is for deferred maintenance on track and roadway returned to C. R. & L. The witness Bryan, who made a personal inspection of the entire roadway and all of the track returned to C. R. & L. (R. 416), testified as to their con-

dition, and to the cost of putting the track in reasonably safe operating condition (R. 415-421), and supported his evidence with written reports containing the details of the inspection and the conclusions (Exhibit 13, R. 1046). The cost of putting the track into reasonably safe operating condition was calculated to be $308,495.52 (R. 416).

(c.)

Materials and Supplies: The claim under this heading is for shortage in the amount of store materials and supplies returned to C. R. & L. This category does not include tools, spare units, garage equipment, or office equipment. It includes only store supplies of the sort listed in Exhibit 15 (R. 1118). The witness Frame was experienced in determining the amount of materials and supplies necessary to maintain a given transportation service, whether by busses or trolley cars (R. 425-426). He determined the amount of materials and supplies necessary to carry on operations of the size and character of the operations of C. R. & L., examined the inventory of materials and supplies turned over to C. R. & L. by The Connecticut Company on November 16, 1936, and calculated the cost of purchasing those materials and supplies which were necessary to carry on the operations of C. R. & L., but which were not turned over to C. R. & L. (R. 425-427, 434-435). The witness testified that this came to $5,344.41 (R. 428). The testimony of the witness (R. 425-436) was supported by a written report containing a detailed schedule of the deficiences in the materials and supplies turned over to C. R. & L., and the cost of making up the deficiency (Exhibit 15, R. 1118).

(d.)

Deferred Maintenance on Buildings: The claim under this heading is for deferred maintenance on certain buildings returned to C. R. & L. on November 16, 1936. The buildings in question are listed in Exhibit 16 (R. 1137), and are situated in Norwalk, Bridgeport, Derby, Waterbury and New Britain. The witness Anderson testified as to the condition of the buildings (R. 436-442), and supported his testimony with a written report containing the details of the inspection and the conclusions (Exhibit 16, R. 1135). The claim of C. R. & L. under this heading represents the cost of the work which should have been performed prior to November 16, 1936, when the buildings were returned to C. R. & L., in order to make the buildings reasonably safe for current operating requirements. The witness testified that this amounts to $95,481.78 (R. 439).

(e.)

Overhead Trolley: The claim under this heading is for deferred maintenance on the overhead trolley system returned to C. R. & L. on November 16, 1936. The witness Wilbraham testified as to the condition of the poles, span wires, trolley wires, etc., and other supporting structures comprising the overhead trolley system (R. 442-444, 449-451), and supported his testimony with a written report containing the details of the inspection and the conclusions (Exhibit 17, R. 1195). The claim of C. R. & L. under this heading represents the cost of work necessary to bring the entire overhead trolley system up to a condition of 50% depreciation—that being taken as the condition in which the equipment should be maintained at all times in order to make it reasonably

safe for current operating requirements (R. 443-444, 450-451). The witness testified that this amounts to $18,878 (R. 443).

(f.)

Power Generating and Trolley Feeder Systems: The properties demised to the Consolidated Railway Company under the lease dated December 19, 1906, and assigned or sublet to The Connecticut Company under the subsequent agreements included two power stations in Bridgeport and Shelton-Derby (R. 445, 612-613). In 1921, The Connecticut Company discontinued generating its own power in the Shelton-Derby area (R. 446). Thereafter it purchased power in the Shelton-Derby area from the Derby Gas & Electric Company, and abandoned the C. R. & L. power station. In 1927, The Connecticut Company likewise discontinued generating its own power in Bridgeport (R. 446), thereafter purchasing power in the Bridgeport area from the New Haven Railroad, and abandoning the C. R. & L. power station. On the return of the property on November 16, 1936, instead of the power plants, there were tendered to C. R. & L. contracts for power from these sources. The wealth represented by the dismantled plants was not accounted for.

It was sought to justify the annihilation of this property by showing that it was cheaper for The Connecticut Company to buy the current under contract than to generate it (R. 458). If this is a valid excuse for abandoning property, it might well be that the entire C. R. & L. equipment of every description could have been abandoned, and merely a series of rental contracts returned to it in satisfaction of the covenant to restore. The metamorphosis of trolley cars into busses is reasonable. Property replaces property. But the change of

real estate into a chose in action is not within the templation of the Lease. Short term contracts with veyors of electricity cannot be considered "the den property as changed" nor as "such equipment, mate and appurtenances as to fully fit it for the immediate of the Lessor in the same manner as at present" (L of December 19, 1906; R. 117). This property subject to the C. R. & L. mortgage of 1901, securing bond issue. C. R. & L. cannot consent that the secu shall be replaced by contracts which, far from bein "permanent source of revenue", are a liability.

The ascertainment of the value of the property re sented by the abandoned power plants was undertaken experts, with the results shown in Exhibit 18 (R. 11 On the assumption that modern plants sufficient for requirements were turned over on November 16, 1936, reproduction cost of such equipment was estim ($1,208,000.), the reasonable accrued depreciation calculated, and the net value thus arrived at ($648,0 (R. 449). The details of the calculations are in Exh 18 (R. 1198).

$648,000. (R. 449), therefore, is the value of po plant property which ought to have been restored C. R. & L., but was not. The claim is in that amo accordingly.

(g.)

Busses: The claim under this heading is for defer maintenance on the busses that were returned to C. & L. on November 16, 1936, and also for shortage the number of busses returned.

(1.) With respect to deferred maintenance, the w ness Smith testified as to the condition of the bus returned (R. 460-463, 467-473), and supported his te

mony with a written report containing the details of the inspection and the conclusions (Exhibit 19, R. 1217).

Certain of the oldest busses were obsolete and were valued as scrap (R. 470).

The busses which were not obsolete were surveyed, and the value of each bus was calculated as of November 16, 1936, when it was returned to C. R. & L., as follows: The unit value of each bus was calculated by figuring what percentage of its estimated life remained unexpired, and taking that percentage of its value new. This figure represents the unit value of the bus as of November 16, 1936, without regard to deferred maintenance. The deferred maintenance was then calculated in four items: paint, engine, transmission, and differential. The sum of these four items was then deducted from the unit value to obtain the actual value of the bus when returned to C. R. & L. on November 16, 1936.

The process of calculating the actual value of busses returned that were not obsolete may be illustrated from Exhibit 19 (R. 1217) by taking the example of bus No. 530.

On page 1271 (Exhibit 19) it appears that No. 530 is a 20-passenger bus. On page 1217 it appears that the value of a 20-passenger bus when new is $5,000.; and that the life of a 20-passenger bus is 60 months. On page 1269 it appears that 33 months or 55% of the estimated life of No. 530 was unexpired on November 16, 1936. The unit value of No. 530, without regard to deferred maintenance, is, therefore, 55% of $5,000., or $2,750.

On page 1218 it appears that the life of the paint on a bus is 18 months, and that the cost of painting a 20-passenger bus is $60. On page 1269 it appears that there is no record of the last painting on No. 530, but that the life of the paint on November 16, 1936, was

completely expired, and that the value of the paint on that date was 0. The deferred maintenance on paint is therefore $60.

On pages 1218 and 1219 it appears that safe operation requires that a bus engine be overhauled every 100,000 miles. On page 1270 it appears that on November 16, 1936, the engine in No. 530 had run 123,638 miles since the last overhaul, that the life of the last overhaul job had more than expired, that the cost of overhaul is $201.38, and that the deferred maintenance on the engine is therefore $201.38.

On page 1219 it appears that safe operation requires that a bus transmission be overhauled every 100,000 miles. On page 1270 it appears that on November 16, 1936, the transmission in No. 530 had run 12,341 miles since the last overhaul, that 87,659 miles or 87% of the last overhaul job remained unexhausted on November 16, 1936, that the cost of overhaul is $48.53, that the unexhausted value on November 16, 1936, of the last overhaul was $42.22, and that the deferred maintenance on transmission is therefore $6.31.

On page 1219 it appears that safe operation requires that a differential be overhauled every 100,000 miles. On page 1271 it appears that on November 16, 1936, the differential in No. 530 had run 10,234 miles since the last overhaul, that 89,766 miles or 89% of the last overhaul remained unexhausted on November 16, 1936, that the cost of overhaul is $54.43, that the unexhausted value on November 16, 1936, of the last overhaul was $48.44, that the deferred maintenance on the differential is therefore $5.99.

On page 1272 it appears that the actual value of No. 530 when it was turned over to C. R. & L. on November 16, 1936, obtained by deducting the four items of deferred maintenance from the unit value, is $2,476.32.

Applying the above formula to each bus which was not obsolete, and calculating the strap value of the obsolete busses as $40. apiece, the value of all the busses returned to C. R. & L. on November 16, 1936, was calculated to be $182,615.10 (R. 463, 470).

The value, when new, of all the busses returned to C. R. & L. was calculated (R. 462-463), and then this figure cut in half so as to represent the value of these busses if they had been depreciated 50% (R. 462), which was taken as what they fairly should be when returned. The figure thus obtained is $497,100 (R. 463).

The claim of C. R. & L. for deferred maintenance on busses represents the difference between the actual value of the busses returned to C. R. & L. ($182,615.10), and 50% of the value of these busses when new ($497,100.). This difference amounts to $314,484 (R. 463).

(2.) With respect to shortage in the number of busses returned to C. R. & L., the witness Crosson testified as to the shortage in Bridgeport and Norwalk (R. 484-503), and his testimony was supported by written traffic checks, records of bus despatchers, and schedules indicating the line requirements for rendering adequate service and the extent of shortage (Exhibit 27, R. 1281). The witness testified that Exhibits 26 and 27 correctly stated the shortage in Bridgeport and Norwalk (R. 492, 494).

The next witness, Chapman, testified as to the shortage in Waterbury (R. 503-522), and his testimony was supported by written reports of bus despatchers, correspondence between the witness and Mr. Bennett of The Connecticut Company (Exhibit 29, R. 1282), and schedules indicating the line requirements for rendering adequate service and the extent of shortage (Exhibits 27, R. 1281 and 30, R. 1306). The witness testified that Exhibits 27 (R. 1281) and 30 (R. 1306) correctly stated the shortage in Waterbury (R. 513-514).

The next witness, Rust, testified as to the shortage in New Britain (R. 524), and his testimony was supported by schedules indicating the line requirements for rendering adequate service and the extent of shortage of shortage (Ex. 27, R. 1281 and Ex. 33, R. 1309). The witness testified that Exhibits 27 (R. 1281) and 33 (R. 1309) correctly stated the shortage in New Britain.

It appears from Exhibit 27 (R. 1281) that there was, in all, a shortage of thirty-four 25-passenger busses, and six 30-passenger busses below operating requirements. This means that that many busses should have been returned to C. R. & L. on November 16, 1936, in addition to the busses which actually were returned at that time, since C. R. & L. was entitled to the return of a sufficient number of busses to meet operating requirements. It appears further from Exhibit 27 (R. 1281) that there was a surplus of eight 20-passenger busses over operating requirements in the busses returned to C. R. & L.

The witness, Rust, testified that the cost of a 25-passenger bus is $6,800., of a 30-passenger bus $9,000., and of a 20-passenger bus $4,500. (R. 524, 525). The cost of thirty-four 25-passenger busses is therefore $231,200., and of six 30-passenger busses $54,000. (R. 525). Taking the sum of these two figures ($285,200.) and crediting against it the cost of the eight surplus 20-passenger busses ($36,000.) a balance remains of $249,200 (R. 525). Cutting this figure in half, in order to apply the 50% depreciation formula, the claim of C. R. & L. for shortage in the number of busses returned to it is $124,600. (R. 526), representing the value of those busses which should have been, but were not, returned to it, depreciated 50%.

(h.)

Trucks and Miscellaneous Equipment: The claim under this heading is for deferred maintenance on service equipment consisting of trucks and other service vehicles such as trailers and tractors returned to C. R. & L. on November 16, 1936. The witness Smith testified as to the condition of this equipment (R. 464-465), and supported his testimony with a written report containing the details of the inspection and the conclusions (Exhibit 20, R. 1274). The value of the equipment new was calculated, and then this figure was cut in half (R. 465) so as to represent the value of the equipment if it had been depreciated 50%, which was taken as what it fairly should have been when returned. The figure thus obtained is $20,824. The actual value of the equipment on November 16, 1936, when it was returned to C. R. & L., was calculated to be $1,533. (R. 465). The claim of C. R. & L. for deferred maintenance on the equipment included under this heading is $19,291., representing the difference between the value of the equipment new, depreciated 50% ($20,824.), and the actual value of the equipment on November 16, 1936, when returned to C. R. & L. ($1,533.).

(i.)

Garage Equipment: C. R. & L. was entitled to the return of a sufficient supply of garage equipment to service adequately the busses which were returned to it. The witness, Smith, testified as to the shortage of garage equipment returned to C. R. & L. (R. 465-466, 474-475), and supported his testimony with a written report containing an itemized schedule of the shortage, and of the cost of purchasing the necessary equipment to make up

the shortage (Exhibit 21, R. 1277). The cost of purchasing the necessary equipment to make up the shortage was calculated to be $14,515.44 (R. 466). Cutting this figure in half in order to obtain the value 50% depreciated of the necessary equipment to make up the shortage, the result is $7,257.72; and that is the claim of C. R. & L. for shortage of garage equipment.

(j.)

Spare Units: In order to service adequately, the busses which were returned to it, C. R. & L. was also entitled to a sufficient supply of spare units such as spare bus motors, transmissions, differentials, etc. The units included under this heading constitute a revolving fund of spare parts which are necessary in order to permit the uninterrupted operation of a fleet of busses. The witness, Smith, testified as to the shortage of spare units turned over to C. R. & L. (R. 466-467, 475-480), and supported his testimony with a written report containing an itemized schedule of the shortage and of the cost of purchasing the necessary spare units to make up the shortage (Exhibit 22, R. 1279). The cost of purchasing the necessary spare units to make up the shortage was calculated to be $6,704.09. Cutting this figure in half, so as to apply the 50% depreciation formula, the result is $3,352., and that is the claim of C. R. & L. for shortage of spare units.

(k.)

General Office Equipment: C. R. & L. was entitled to the return of a sufficient supply of furniture and equipment to meet the requirements of maintaining a general office. The witness, George, testified as to the shortage of office equipment (R. 480-484), and as to the cost of

purchasing the equipment necessary to make up the shortage. His testimony was supported by a schedule of the shortage, and of the cost of purchasing the equipment necessary to make up the shortage (Exhibit 23, R. 1280). The witness testified that the cost of purchasing the equipment necessary to make up the shortage was $9,081.30 (R. 483). Cutting this figure in half, so as to apply the 50% depreciation formula, the result is $4,540.65; and that is the claim of C. R. & L. for shortage of general office equipment.

(l.)

Transfer Registration Fees: The claim under this heading is for the cost of transferring the registrations, or licenses, of the busses and other vehicles returned to C. R. & L. on November 16, 1936, from the name of The Connecticut Company to the name of C. R. & L. These vehicles, being the property of C. R. & L., should, under the lease, have been registered or licensed in the name of C. R. & L., and C. R. & L. accordingly has a claim for the fees which it was compelled to pay to the State Motor Vehicle Bureau in order to accomplish the necessary transfer. The witness, Carr, testified that these fees amounted to $152. (R. 559); and that is the claim of C. R. & L. for this item.